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No. 529

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

PROTECTION MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

PLANTERS MANUFACTURING COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CASES I
INTRODUCTION 1
OPINIONS BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
STATEMENT 3
REASONS FOR DENYING CERTIORARI 4
CONCLUSION 10

Table of Cases

Denman v. *Spain*, 242 Miss. 431, 135 So. 2d 195 (1961) 7, 10
Dick v. *New York Life Ins. Co.*, 359 U.S. 437 (1959) ..7, 10, 11
Lavender v. *Kurn*, 327 U.S. 645 (1946) 3, 4, 6, 10
Mercer v. *Theriot*, 377 U.S. 152 (1964) 7, 10, 11
Necaise v. *Chrysler Corporation*, 335 F. 2d 562 (5 Cir., 1964) 4
Pennsylvania Railroad v. *Chamberlain*, 288 U.S. 333 (1932) 3, 5, 6, 10
Pogue v. *Great Atlantic & Pacific Tea Company*, 242 F. 2d 575 (5 Cir., 1957) 4
Ralston Purina Co. v. *Edmunds*, 241 F. 2d 164 (4 Cir., 1957) 9
Reuter v. *Eastern Air Lines*, 226 F. 2d 443 (5 Cir., 1955) 4
Revlon, Inc. v. *Buchanan*, 271 F. 2d 795 (5 Cir., 1959) .. 4
Royal Indemnity Company v. *Curtis*, 256 F. 2d 329 (5 Cir., 1958) 4

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Notwithstanding the broad and important questions presented by Petitioner, in the final analysis all that is actually involved in this controversy between private litigants is an appraisal of the fair inferences to be drawn from respondent's evidence at the trial in 1964 before a

District Court jury. By whatever standard measured that evidence is sufficient to support the inference of ultimate fact which the jury found. Hence respondent respectfully urges that the petition for writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fifth Circuit on May 26, 1967, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals (not yet reported) reversing the trial court's judgment n.o.v. and remanding the case for a new trial in accordance with the trial court's ruling on petitioner's motion for judgment n.o.v. or in the alternative for a new trial, and the opinion of the trial court (244 F. Supp. 721) appear in the Appendix to the petition. App. to Pet., pp. 1a-24a and pp. 25a-38a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1967. This Court has jurisdiction in this case pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner, on page 2 of its petition, presents two questions:

"1. Whether a federal court sitting in a diversity case must apply a federal test of sufficiency of the evidence to support a jury verdict where the applicable state standard is admittedly different and would produce a contrary result.

"2. If a federal standard must be applied, should it be:

"(a) that set forth in *Pennsylvania Railroad* v. *Chamberlain*, 288 US. 333, 339 (1932), i.e. 'Where proven facts give equal support to each of two inconsistent inferences . . . judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of those inferences as against the other,' or

"(b) that contained in *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946), to the effect that equally conflicting inferences are 'immaterial' and judgment n.o.v. can be granted 'only when there is a complete absence of probative facts to support the conclusion reached.'"

STATEMENT

As stated in the petition this is a diversity action in which respondent as the insured sought to recover from petitioner, the insurer, substantial monetary loss caused by extensive damage to a large soybean warehouse. The policy covered such damage, if caused by explosion, but not if caused by structural deficiency and/or overload. Respondent contended that the damage resulted from an explosion of soybean dust inside the building in the air space remaining between the bean pile and the roof of the building. While it was conceded that an explosion of soybean dust may occur, petitioner denied that an explosion did occur and contended that the building simply collapsed because of structural deficiency due to inodequate design and an overload of beans. At the trial each side offered extensive evidence, including the testimony of expert witnesses, in support of its own contention and in opposition to that of its adversary. The jury returned a verdict for respondent, but the trial court granted petitioner's alternative motion for judgment n.o.v. or for a new trial, entered judgment for petitioner, and

granted a new trial in the event the judgment n.o.v. be vacated or reversed on appeal. On appeal by respondent, the Court of Appeals reversed and ordered the case remanded to the District Court for a new trial.

REASONS FOR DENYING CERTIORARI

With respect to the first question which petitioner would have the Court decide, respondent does not concede that application of the state (Mississippi) standard would produce a contrary result. It was never questioned before the trial court, either in the oral arguments or in the briefs of counsel, that the standard to be applied was a federal one and in its opinion the trial court relied solely upon federal decisions.[1] In the Court of Appeals, as a necessary predicate to its argument for application of the *Lavender* standard, respondent devoted a mere two-and-one-half pages of its brief to the proposition that the applicable standard is a federal one. In its brief before the Court of Appeals petitioner joined no issue on this question, but ignored it and dismissed respondent's entire argument in support of the *Lavender* standard thus:

> "The entire substance of the argument from page 17 through page 29 of appellant's brief is an academic discourse on the question of whether the rules of certain F.E.L.A. and Jones Act cases should apply here. If appellee regarded the issue raised by appellant as significant to a determination of this case, an extended argument could and would be made that this line of cases is limited to the specific statutory situations in-

1. The Fifth Circuit has on at least five prior occasions squarely held that the sufficiency of evidence to support a jury's verdict is one of federal law. *Reuter* v. *Eastern Air Lines*, 226 F. 2d 443, 445 (5 Cir., 1955); *Pogue* v. *Great Atlantic & Pacific Tea Company*, 242 F. 2d 575, 582 (5 Cir., 1957); *Royal Indemnity Company* v. *Curtis*, 256 F. 2d 329, 331 (5 Cir., 1958); *Revlon, Inc.* v. *Buchanan*, 271 F. 2d 795, 800 (5 Cir., 1959); and *Necaise* v. *Chrysler Corporation*, 335 F. 2d 562, 567 (5 Cir., 1964).

> volved. The fact is, however, that each of these cases, as a fundamental basis for its decision, recognizes that the jury's verdict must—in any instance—be based upon a reasonable probability which could be inferred from the evidence."

Thus, as between petitioner and respondent, the two private parties concerned with the outcome of this litigation, there was no issue below as to the propriety of applying a federal standard to test the sufficiency of respondent's evidence, but only (and by petitioner's choice) whether the jury's verdict was based upon a reasonable probability which could be inferred from the evidence. (Note that at page 7 the petition equates the Mississippi standard with the *Chamberlain* standard which petitioner categorized in its Court of Appeals brief as one of "reasonable probability.") Respondent asserts that its evidence meets the standard of sufficiency whether it be "reasonable probability" or something less.

It is not only conceded that an explosion of soybean dust may occur, but that three factors are essential to such an occurrence:

1. A combustible mixture of bean dust and air;
2. A source of ignition; and
3. Containment, i.e. the forces generated by the combustion must be confined or contained.

Further, containment is a relative matter, not an absolute one.

Both courts below agree (App. to Pet., p. 20a) that as to factors 1 and 2 "the verdict is on sound ground". But as to the sufficiency of respondent's evidence to establish the third factor, containment, their respective views are completely divergent. The trial court was of the opinion that respondent's evidence not only wholly failed to establish containment, but actually was contrary to

established physical law and literally impossible. The Court of Appeals disagreed and found "no adequate basis in the record to sustain the position taken by the trial court that the explosion postulated by the plaintiff's witness was literally a physical impossibility." (App. to Pet., p. 24a)

Despite its observation that "the verdict is on sound ground" as to factors 1 and 2, the trial court dismissed as "equivocal" virtually all of the remainder of respondent's evidence, but the Court of Appeals was of the opinion that it "cannot be so lightly disregarded." (App. to Pet., p. 18a) Indeed, it found portions of that evidence "patently consistent with plaintiff's theory of an explosion" and "somewhat difficult to reconcile with defendant's theory of structural failure." (App. to Pet., p. 18a)

By whatever standard measured, the most compelling indication of the sufficiency of respondent's evidence to support the jury's inference of the ultimate fact that an explosion occurred is this sharp conflict in the respective appraisals of that evidence by the two courts below. If these able and experienced courts differ so widely in their evaluations of respondent's evidence, it necessarily follows that reasonable men might also, reasonably and rationally, differ. That such differences should be resolved by juries and not judges is surely no longer open to question.

Moreover, the evidentiary analysis by the Court of Appeals makes it clear that we are not concerned with the equally balanced conflicting inferences of the *Chamberlain* standard, but rather with evidence which is consistent with an explosion and "somewhat difficult to reconcile with" structural failure. In short, an explosion is the more probable ultimate fact. Hence, there is no need to choose between *Lavender* and *Chamberlain*. And if, as petitioner argues (Pet., p. 7), *Chamberlain* and the

Mississippi standard [assuming arguendo the latter to be exemplified by *Denman* v. *Spain*, 242 Miss. 431, 135 So. 2d 195 (1961)] are essentially the same, then it makes no difference which standard is applied, the evidence is sufficient by any, as in *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959) and *Mercer* v. *Theriot*, 377 U.S. 152 (1964).

In succinct summary these are the facts in support of respondent's explosion theory of liability which the jury was entitled to, and presumably did, consider in finding as an ultimate fact that an explosion did occur:

1. An explosion of soybean dust may occur.
2. The factors essential to such an occurrence are:
   a. A combustible mixture of dust and air;
   b. A source of ignition; and
   c. Containment—a relative factor which permits damage without total destruction.
3. The bean house had a capacity of about 14,000 tons and at the time contained about 12,600 tons of beans.
4. Beans were being dropped into the house from the overhead metal trough by a screw conveyor and the airspace between the bean pile and the roof was extremely dusty.
5. Beans are not screened and tramp metal and rocks are often present as the beans are dropped from the overhead conveyor through metal spouts into the house.
6. One of the two men inside the beanhouse at the time heard a repeating noise like a rock or a piece of metal in the overhead conveyor, then saw a quick flash of fire which was followed immediately by an "awful" noise.

7. To other laymen outside the beanhouse the noise sounded variously like a cannon, a 5-inch naval gun, dynamite blasting stumps, or a jet aircraft breaking the sound barrier.

8. A cloud of smoke or dust and debris rose above the building and its entire roof lifted, then two-thirds of the building collapsed along its center or longitudinal axis without appreciable side movement such as would have occurred had one side wall or the other simply collapsed.

9. A distinct "burnt odor" was noticed.

10. The building was properly designed and structurally sound and had an anticipated useful life of 30 to 40 years. It was eleven years old.

11. The building was properly loaded to the eave line. It was not overloaded and in fact had room in the north end for an additional 1,500 to 2,000 tons of beans.

12. The building had been similarly used for the 10 preceding years and had frequently been completely filled with beans from end to end.

13. There was not even a suggestion that any force of nature such as windstorm, lightning or earthquake was a causative factor.

14. A graduate engineer, sent by petitioner as an investigator, took dust samples from both the damaged and the undamaged portions of the building, labeling the first sample as containing carbon and the second as not containing carbon.

15. Subsequent examination of these dust samples by a professional chemist revealed the presence of carbon particles in the sample from the damaged area and none in the sample from the undamaged area.

16. A soybean dust explosion is a form of combustion and carbon is a by-product of combustion.

As said by the Court of Appeals (note 10, App. to Pet., p. 17a) in distinguishing *Ralston Purina Co.* v. *Edmunds*, 241 F. 2d 164 (4 Cir., 1957):

> "The inference upon which appellant relies here is supported, inter alia, by testimony that the claimed explosion sounded like an explosion, loosed a billowing cloud of dust or smoke, caused sheet metal and other debris to rise in the air, lifted the roof of the building, and left in its wake an odor of burning. It is further strengthened by positive testimony that the beanhouse was loaded only to the eave line, as it was designed to be—testimony which, if believed by the jury, would thoroughly discredit the explanation offered by the defendant, that the collapse resulted from a structural failure caused by overloading."

The plain fact is that something extraordinary happened to respondent's beanhouse. The jury obviously believed, as it was clearly entitled to do, the testimony of the engineer who designed the building (and countless others like it) that the building was properly designed and structurally sound and the testimony of respondent's employees that it was not overloaded. It is equally obvious that the jury, completely within its province, rejected the contrary evidence offered by petitioner. There was no sudden act of nature such as windstorm, lightning or earthquake. Nevertheless, this structurally sound, underloaded building suddenly collapsed while containing within its airspace above the bean pile an explosive mixture of bean dust and air, all accompanied by a sudden flash of fire, a great noise which sounded like an explosion, a lifting and collapse of its roof, a billowing cloud of dust or smoke and debris, and an odor of burning.

Respondent respectfully submits that the only reasonable explanation is that there was a dust explosion inside the building which generated enough pressure to

lift the roof and cause collapse. Otherwise, this was simply a mysterious occurrence not attributable to structural deficiency and/or overload or to any force of nature. Clearly it is more probable that it was due to a dust explosion. The jury so found and in so doing, it drew an inference of ultimate fact which meets the standard of reasonable probability. It is thus unnecessary to determine in this case whether the sufficiency of respondent's evidence is to be judged by *Chamberlain*, *Lavender*, or *Denman* v. *Spain*.

CONCLUSION

For the reasons stated above, respondent respectfully and with deference suggests that if the writ be granted, as prayed by petitioner, the questions presented will again evaporate as they have done before in *Dick* and *Mercer*. The first question presented, whether a state or federal standard applies in determining the sufficiency of evidence to support a jury verdict, is not necessary to a decision here. It is submitted that the evidence in the trial court, as outlined above, is sufficient under any standard to support the verdict of the jury. Further, no one had suggested that a state standard be applied in any of the proceedings below until the petition for certiorari was filed.

With respect to the second question presented, whether the standard of *Chamberlain* or that of *Lavender* should be applied in testing the sufficiency of the evidence, respondent submits that a like conclusion must be reached. In the light of the Fifth Circuit's interpretation of the evidence introduced by the respondent at trial, it is submitted that the motion for judgment notwithstanding the verdict should have been denied regardless of whether *Lavender* or *Chamberlain* applied.

A review of this case will involve the mastery of certain scientific principles, the consideration of lengthy expert testimony, the evaluation of imprecise lay evidence and the study of a myriad of physical exhibits. In short, this Court will find itself embarked upon the laborious task of evaluating a lengthy record with numerous physical exhibits in order to decide a private controversy. Though important questions have been suggested by petitioner as being involved in this case, respondent respectfully submits that the Court's efforts to decide these questions will be frustrated again as has been the case in *Dick* and *Mercer*. The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should, therefore, be denied.

Respectfully submitted,

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